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MEDIATION IN NORTH MACEDONIA AND THE LEGAL NATURE OF THE MEDIATION AGREEMENT

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Abstract

Mediation as an alternative mechanism or method of resolving disputes of various natures, with which to the citizens is given the opportunity to avoid long, exhausting, and very expensive court procedures, was actually presented as a response to the inefficient and problematic judiciary systems in many countries in the world, including the Republic of North Macedonia. It is the agreement that the parties manage to materialize at the end of the process of talks and negotiations with the help of the mediator, which in terms of the way it was reached and its character is unique, because it puts an end to all the disputes that the parties have in the moment of the implementation of the procedure, but also regulates the relations between them in the future, which distinguishes it from the court decision brought in a regular court procedure.

In this paper, a special emphasis will be given to the theoretical analysis of the legal nature of the agreement reached between the parties in the mediation procedure initiated as a voluntary procedure, respectively as a procedure instructed by the court.

At the end of the analysis and research, we will easily distinguish the agreements that the parties reach in the mediation procedure initiated as a result of the contentious procedure and the one reached in the mediation procedure initiated regardless of the contentious procedure.

***Keywords*:** *mediation, ADR methods, mediation agreement, voluntary mediation, instructed mediation.*

Introduction

Mediation is one of the most used alternative dispute resolution methods worldwide. It is an "intervention by a neutral third person(s) into an already existing process of negotiation in order to facilitate the joint decision making process between people who are becoming polarized and are colliding unproductively over differences in goals, methods, values, perceptions, etc."[351] The role and the duty of the mediator as a third party is only to facilitate the process and not to decide for it. In the beginning, the mediation procedure was initiated and applied outside the judicial system only, but on these recent times it is applied more and more inside it (i.e. court annexed mediation). This procedure can be initiated and implemented based on the agreement between the parties either before or after the initiation of the dispute procedure with or without the court's instruction.[352] The court's instruction to the parties to resolve their

[351] Keltner, J. W. (1987). Mediation: Toward a Civilized System of Dispute Resolution. United States: ERIC Clearinghouse on Reading and Communication Skills, Office of Educational Research and Improvement, pg. 11
[352] Article 1, para. 1, Law on Mediation

dispute through mediation, in no way can be considered binding. This is actually a term that the legislator has used in the law in order to inform the parties that there are other ways in which they can resolve their dispute and the fate of resolving their dispute depends on them. This is so because in the Republic of North Macedonia, mediation as an alternative way of resolving disputes is optional, voluntary and not mandatory, which means that the moment of initiating the mediation procedure depends exclusively on the will of the parties and on none other. No one has the right to impose on the parties the choosing of mediation as a procedure by which they will decide their contentious case, least of all the judge, lawyers or other participants. The initiation and implementation of the dispute procedure or the mediation procedure does not represent any procedural prerequisite or presumption for the initiation of the contentious procedure or the mediation procedure. In fact, although these two procedures can act together helping each other, they can also be independent in the full sense of the word and act independently. However, in cases where the contentious procedure is initiated and during it the mediation procedure as well, they can coexist, act together and help each other for the resolution of the dispute in the contentious procedure. Regarding the fact, whether mediation procedure can be initiated if the contentious procedure has been already initiated or not, the subject of which is the contentious issue that is desired to be resolved through mediation, the legal provisions provide that it can be initiated both before and after the initiation of the contentious procedure, respectively during the contentious procedure. Thus, Article 4, para. 3 of the Law on Mediation foresees the cases when the parties, during the conclusion of any agreement for economic/trade activity between them, can agree that in the event of occurring any dispute in the future, to resolve the same in a mediation procedure before the initiation of court proceedings or any other procedure. Law on mediation also regulates the issue of the legal power of the mediation agreement achieved between the parties both before and after the initiation of the dispute procedure[353], as well as articles 4 and article 18 paragraph 3 of the Law on mediation are regulating the relationship of mediation with the judicial procedure, according to which the court/judge is authorized to instruct the parties to resolve their dispute through mediation during all stages of the first instance contentious procedure, in which case if the parties decide on such a solution, the judge is obliged to interrupt the procedure and guide the parties in resolving the dispute through mediation. According to this, we can conclude that in the Republic of North Macedonia, both models of mediation are accepted, including the one that is initiated before the starting of the contentious procedure, known as private mediation, and the court-annexed mediation, which is presented when the mediation is initiated while the contentious procedure is ongoing.

As the final stage with which the mediation procedure is concluded is the stage of concluding the mediation agreement between the parties. At this stage, the mediator has a completely opposite role compared to the judges of the contentious procedure regarding the end of the procedure. Thus, the mediator does not bring a final and authoritative decision like the judges, which decision would be binding on the parties. At this stage, the parties with the help of the mediator reach a compromise regarding the issues that are disputed between them, and then conclude an agreement with which they resolve their conflicting situation. What for the parties until then was considered a contestable issue, after reaching the compromise can be freely considered as uncontested issue. The next step is the compilation of mediation agreement[354]. Before the agreement between the parties is finally reached, the mediator must help the parties if he notices that none of them give up their positions and claims, keeping in mind that the agreement of the parties which will have to be concluded between the parties it must be reasonable and applicable and especially in compliance with the law. It is preferable for the parties to be the ones to compile this agreement, except in cases where the parties ask the mediator to do this instead of them. Once the mediation agreement is compiled, it must be signed by the parties, within a period of three working days, this period starting from the day when the agreement is reached between the parties. According to the previous Law on mediation, it was the duty of mediator to also confirm the agreement reached between the parties with his own signature which duty is

[353] Article 28, para. 1 and 3, Law on Mediation
[354] Article 26, para. 2, Law on Mediation

not foreseen in the actual law.[355] In case that at this stage the parties cannot reach a common language for the resolution of their dispute, they will try to resolve their dispute in a contentious procedure, in which it will not be tolerated in any way that the data's and information's that have been obtained and that have been used and released by the parties during the sessions of the mediation procedure, to be reused in the contentious procedure.

The Law on Mediation, in addition to these two ways of concluding a dispute procedure, also provides the following concluding ways: by concluding a written agreement for the resolution of the dispute between the parties; with the mediator's written statement after consultations with the parties that further attempts at mediation are not reasonable; with a written statement from the parties to the mediator that the mediation procedure has ended, as well as with a written statement from any party to the procedure to the other parties and to the mediator, if the same has been appointed, that the mediation procedure has ended, by ceasing of the party – legal entity, by death of the party – natural person, by ceasing of the mediator involved in the mediation procedure, with bringing of a decision for prohibiting the mediator to perform any work related with mediation and in case the mediation procedure is not concluded within the period of 90 days. However, regardless of the final outcome of the mediation procedure, it must be completed within a period of 90 days, which period starts from the day of the declaration for the initiation of the mediation procedure (Article 28, paragraph 1 LM)[356]. The law on mediation foresees that if any obligation of the party is defined in the agreement, that agreement may contain a clause for enforcement. According to Article 28, al, 1, when the mediation procedure is initiated before the initiation of the contentious procedure, and the parties wish to give the agreement enforceable power, they can notarize the agreement, in which case that agreement acquires the quality and the power of an enforceable document.

When the mediation procedure is initiated during the contentious procedure and then concluded with mediation agreement, this agreement for the contentious court represents a basis for the parties to conclude a judicial settlement, which settlement will be signed in the minutes, as a result of which the contentious procedure that was initiated will be concluded.

Legal nature of mediation agreement in mediation procedure

In this part, the emphasis will be placed to the legal nature of the agreements of the mediation procedure concluded in court proceedings, respectively as agreements for the judicial settlement and for the agreements which are concluded in the mediation procedure but without having any connection with judicial procedures, i.e. concluded before the initiation of the contentious procedure, which are considered as mediation agreements with legal force of out-of-court settlement. One of the ways in which a certain dispute between the parties is resolved is to reach an agreement in the mediation procedure. "Once the agreement has been reached on a settlement, it should be committed to paper and signed by the parties"[357]. According to the previous Law on mediation (2013) the agreement is compiled in writing form by the parties themselves (exceptionally, they may also request that the mediator compile it up). In order for the mediation agreement to be considered binding, according to the law, it must be signed by the parties (Article 21, paragraph 1). The law on mediation of 2006 in article 22 provided the rules for the agreement of the parties reached in the mediation procedure. It foresee that "the agreement reached through mediation need to be compiled up in writing form by the parties themselves or at their request is compiled by the mediator, while the parties needs to sign it" and "the agreement reached in the mediation procedure signed by the parties is certified by the mediator with his own signature". Whereas according to Article 21 of the 2013

[355] According to Article 21 of Law on mediation of 2013, para. 2 all the agreements which are concluded through mediation and which are certified by the mediators with a signature, are submitted to the Ministry of Justice in order to be registered in the Registry for evidence of mediation procedures.
[356] Article 20, para. 2 of Law on mediation of 2013 foresee the deadline of 60 days for concluding the mediation procedure from the day of giving the statement about the initiation of the procedure, regardless of its outcome.
[357] Spencer. D, Brogan. M, (2006), Mediation Law and Practice, Cambridge University Press, Cambridge, pg.73

Law on mediation, if the agreement was concluded before the initiation of the dispute procedure, it is also signed by the mediator, who certifies that agreement with his own signature and submits it for registration in the Register for recording the procedures of mediation. As for the current Law on mediation of 2021 obligates only the mediator in the period of three working days from the day when the parties achieved the agreement, to compile it in writing form[358]. Let us analyze the articles in the three mediation laws that were and is implemented in R. of North Macedonia. Although at first glance article 21 of Law on mediation of 2013 with the first two paragraphs seems a little confusing about who signs the agreement, if we interpret this article, we will conclude that the mediator will sign the agreement only when it is reached between the parties before the initiation of the dispute procedure and not the agreement which is reached in the mediation procedure that is initiated after the initiation of the dispute procedure. If we make an interpretation of the two articles that regulate the issue of reaching an agreement between the parties, respectively articles 22 of the law on mediation of 2006 and article 21 of the previous law (Law on mediation, 2013), we would notice that the law of 2006 did not differentiate when the mediator signed the agreement and when the parties signed it, as the current law on mediation is making that difference. There are several reasons that have contributed to the fact that the legislator is more precise in terms of these already disclosed issues.

According to the law of 2013, one of main duties of every mediator was to submit for registration to the Ministry of Justice all the agreements that have been reached in the mediation procedure, which obligation was not foreseen in the 2006 law, and it would be especially problematic when there should be no evidence of mediation agreements when the contentious procedure is concluded and the parties manage to conclude an agreement for mediation in the mediation procedure, while the mediator, who according to the law of 2006 was not obliged within a period of 3 days (as ordered by the current law on mediation respectively with article 21, paragraph 1 of Law on mediation of 2013) respectively within the period of 8 days[359] according to the current law on mediation which is applicable now, to submit the agreement reached between the parties to the competent court, which agreement would serve as the basis for the judicial settlement[360]. If the mediation agreement is reached while the contentious procedure is suspended, this does not mean that the suspended contentious procedure is automatically terminated, a situation which was implied by the old law by the fact that neither the mediators nor the parties had an obligation to notify the competent court of such an agreement reached, which obligation exists today with the current Law on mediation. The contentious procedure would end when the parties would sign the minutes for judicial settlement, which would be confirmed and ascertained by the agreement reached between the parties with the help of the mediator in the mediation procedure, which agreement the mediator and the parties submit to the court which is competent for the implementation of the interrupted contentious procedure, while the agreement would gain the same legal power as the judicial settlement only when it will be recorded in the minutes of the judicial settlement. So, if the same legal issue is presented and between the same parties, then the defendant has the right to use one of the means for legal-procedural protection, respectively he has the right to "object that a judicial settlement has been concluded" even that it is the basic duty of the court to take care of this matter according to its official duty – *ex officio*. These are those type of procedural actions by which the defendant tells the court about the existence of procedural obstacles that prevent the meritorious decision for the specific disputed issue. As for the volume of the legal power of the mediation agreement and with this of the judicial settlement agreement also, as mentioned above, it can include the entire claim or only one part of it. So, the future of the contentious procedure also depends on it, will it end

[358] Article 26, para. 2, Law on mediation

[359] Article 28, para. 3, Law on mediation

[360] Also with the amendments to the Law on contentious procedure with the Law on Amendments and Supplements to the Law on contentious Procedure, " No. 116/10, according to which a new paragraph is added to Article 308, respectively paragraph 4, according to which the obligation of the parties to submit the agreement reached in the mediation procedure to the competent court within 8 working days from the day of its conclusion. As a result, the court appoints a hearing in which, with minutes, It will ascertain the agreement concluded, which will acquire the power of a judicial settlement when the conditions for binding a judicial settlement are met in accordance with Article 307.

all of it or will it end up to that part which was the subject of the agreement for mediation and with this also the subject of the agreement for judicial settlement. As for the new current law, in its article 26 para. 2, foresees that all the agreements reached between the parties in mediation procedure, needs to be compiled by the mediator according to the instructions of the parties, doesn't matter whether that agreement was reached in the mediation procedure initiated after the contentious procedure or outside of it[361].

In order to reach a resolution of the dispute through the agreement reached after the initiation of the contentious procedure, there must be an activity regulated by law of the parties and their representatives, as well as of the court on the other hand. With this activity, mutual satisfaction is achieved both for the parties on one side, and for the court on the other side, for the avoidance of the long and expensive procedure and above all, the avoidance of the court's decision which may be unfavorable for one of the parties in the process, while the satisfaction of the court, is shown by the fact that the contentious issue of the parties has been resolved in a peaceful atmosphere, in which case there is no need to give legal protection to only one of the parties in the dispute. Another point that distinguishes the agreement reached in the mediation procedure and the one reached in the case of the conclusion of the agreement for judicial settlement is that the agreement of the first type is signed only by the parties and not by their representatives in case they have appointed them during the procedure of mediation, while in the agreement related to the conclusion of the judicial settlement which is based on the agreement reached in the mediation procedure, the agreement is signed by the representatives of the parties if they have one appointed. Above it was mentioned that the participation of the representatives of the parties, respectively their lawyers, does not make it difficult, but on the contrary it helps and represents an advantage in terms of resolving the dispute from the legal point of view. This is so because, unlike the contentious procedure where the issue was resolved only from the aspect of law and through the application of material law, in the mediation procedure more importance is given to the resolution of the contentious issue from the interest point of view and the needs of the parties. For this reason, their presence during the sessions and especially during the compilation of the final agreement is more than welcome. It is considered that it would not be harmful at all, but in fact very useful, that the minutes of the judicial settlement be signed by the representatives of the parties, who with their signatures seal the conclusion of the agreement from the legal point of view. This is how an overview of the described situation would be achieved: only the parties would sign the agreement reached in the mediation procedure, while their representatives should also sign the record of judicial reconciliation, in addition to the parties. This would have consequently, a higher legal certainty, especially in cases where an obligation of one of the parties is defined by means of the agreement, where with their signature, that record would become enforceable. This method guarantees that the obligation specified in the agreement will be 100% enforceable, which is an obligation that the European Union requires from the member states in the field of mediation[362].

There is also another point that should be given importance. There are two principles of the mediation and the contentious procedures, which are contradictory in terms of the sessions that must held and the announcement in the minutes of the judicial agreement in the contentious procedure. As far as in the

[361] Јаневски.А, Зороска-Камилоска. Т, (2009), Граѓанско процесно право, книга прва, Парнично Право, pg. 389

[362] In the fourth part of the Recommendation of the Committee of Ministers of the member states on mediation in family disputes, the obligation of the states to facilitate the acceptance of the agreements reached in the mediation procedure by the courts or any other competent body when such a thing is requested by the parties, as well as to provide mechanisms for the execution of such accepted agreements in compliance with the legislation of each country - Recommendation No. R (98) 1, Committee of Ministers to member States on family mediation, Council of Europe, 1998; In point 19 in the introduction part of the directive, it is emphasized that mediation should not be considered as a poorer alternative to court proceedings in the sense of reaching a mediation agreement, which agreement depends exclusively on the good will of the parties for its implementation and for this because it must be ensured that each member state prohibits an agreement from being enforceable if its content will be contrary to the law, including international private law, or if the law does not provide for the enforcement of the content of a certain agreement (these cases would be considered in the agreement as non-enforceable) – Directive 2008/52/EC.

mediation procedure, all the information that emerges during the procedure and that can be presented as evidence in other procedures are confidential, and as such it is considered a confidential procedure. But, what happens when the agreement reached between the parties will have to be recorded in the minutes for judicial reconciliation, which must be done in a session where the principle of publicity will prevail, according to which the sessions in the contentious procedure are public and all persons interested can participate in it[363]. In these cases, it is considered as the best solution, the parties to be those who will allow the participation of the public in the session of compiling and signing the minutes for judicial reconciliation, respectively to disallow in cases where in the session of compiling and signing the minutes it is determined that will appear highlighting information that is of a personal and intimate nature, with which the interests of the party would be put into question due to the public disclosure of information of an official/business nature, when the announcement of the information would also put into light the public order or morality of the parties.

In addition to the binding of the judicial reconciliation, the parties may be able to resolve their contentious issue in the mediation procedure regardless of the initiation of the contentious procedure. The agreement reached in this way is considered as an agreement with legal force of out-of-court settlement. In these cases, due to the lack of connection between the agreement reached and the judicial procedure, the parties are not obliged to submit such an agreement to the court for proceedings, respectively, to be the basis for the conclusion of the judicial settlement. If we look from the aspect of the Law on obligations, the agreement that is reached in the mediation procedure, is considered a contract that produces legal effects between the parties "inter partes". Its content is determined exclusively by the parties and with their will, and its implementation also, respectively the performance of the obligations defined in it, depends on the parties themselves and on their will. In the event that one of the parties does not fulfill the obligation it is defined in the content of the mediation agreement, the other party has the right to initiate a contentious procedure by which it will request the fulfillment of the unfulfilled obligation. However, this would not be what the parties would want, seeing that they first agreed to resolve their dispute through mediation, and then, due to non-compliance with the agreement, initiate a contentious procedure! The law has foreseen an opportunity which can be offered to the parties to avoid such situations. In the old law on mediation of 2006, respectively in article 22, al. 4, the mediation agreement would gain the power of an enforceable document if the same was notarized. According to this law, the agreement would become an enforceable document only if the signatures of the parties were certified by a notary. With the Law on mediation of 2013 and the current applicable law on mediation, it is required that in addition to the signature, the notary must certify the substantive side of the agreement. The issue of solemnization or authentication of private documents for legal matters is regulated in the Law on Notary[364], according to which the notary always authenticates documents in accordance with Article 3, para. 3 and as such is considered an enforceable document, as well as according to articles 29, 30, 31, 32 and article 54 of this law, it is established that there is no obstacle for authentication, the same will be authenticated - solemnized. In cases where the agreement in terms of form and content does not meet the conditions provided by law, in those cases the authentication will be done through the drafting of a separate notarial act, in which case the private document or the mediation agreement will be attached to the notarial act and thus will be considered as an integral part of the notarial act.

This document will be signed both by the notary and by the parties to the mediation agreement. Also, article 53 of the Law on notary states the procedure for the enforcement of notarial documents according to which all notarial documents according to their power are enforceable documents if there is any specific obligation stipulated in it, for which obligation the parties can agree that in case of non-fulfillment of the obligation may be enforced. Thus, if the party that has the obligation to fulfill any obligation specified in the mediation agreement or in the agreement solemnized by the notary does not fulfill it voluntarily, the other party that

[363] Article 292, para. 1, Law on contentious procedure
[364] Law on Notary, "Official Gazette of R. North Macedonia", nr. 72/16, 172/16 and 233/18

requires the fulfillment of the obligation may by means of a written request and certified statement to the notary for the achievement of the request, based on which the notary will establish the clause for the execution of the document.

As for the legal nature, the mediation agreement as an out-of-court agreement differs from the agreement on judicial settlement as a judicial agreement, because the mediation agreement concluded as a result of a private mediation procedure, does not have the power of the judgment, and thus the contentious issue resolved in the mediation procedure with the mediation agreement does not represent a judged case - "res iudicata" as was the situation with the agreement of the judicial reconciliation. Thus, in case of filing a lawsuit for the same contentious issue and between the same parties, the court is not obliged to take care of it "ex officio" whether it has been decided on the same issue once or not in mediation procedure. Thus, in these cases, it is also excluded the right of the defendant to submit an objection that a judicial settlement has already been concluded for that matter. On the other hand, the law on mediation allows the mediation agreement to be the subject of a lawsuit in a contentious procedure. Thus, in accordance with Article 29 of the law on mediation, a lawsuit can be submitted for the finding of invalidity, respectively with a lawsuit for annulment for which the legal provisions from the Law on Obligation Relations will be applied. As legal consequences of these two legal remedies, they can lead to the declaration of the invalid agreement, which acts immediately, respectively "ex tunc", or can lead to the cancellation of the mediation agreement, which will be considered "null" from the moment of her conclusion. In practice, cases of non-fulfillment of the mediation agreement are rare, since the parties regularly and fully fulfill it, as it is in their interest to fulfill it, to avoid mandatory enforcement or even initiation of contentious procedure.

Conclusion

Because mediation in the legal system of the Republic of North Macedonia is a new category of alternative dispute resolution methods, in practice it is still very little developed. Today, it can be considered that mediation actually exists mostly as a procedure written in laws and international documents and scientific works, rather than as a procedure that is implemented in practice in our country. This may be a consequence of several factors that prevent its flourishing in the legal practice of the Republic of North Macedonia. As such factors which are emphasized the most by mediators, experts, and also by professionals who deal with research in the field of mediation are counted: large-scale of non-information of citizens about the advantages of mediation but also about its existence as an alternative method of dispute resolution; the minimum engagement of the subjects or bodies which have the task of promoting this method of dispute resolution; distrust of citizens towards the mediation procedure due to not providing the necessary security for obtaining the necessary legal protection as a result of resolving the dispute through the mediation procedure and with this, extending the trust to the classic judicial procedure; the lack of good education of the parties and lack of the necessary legal culture for the selection of mediation in the group of numerous methods for the resolution of their dispute and similar.

But, above all the biggest issue that is not letting the mediation procedure in our legal system to find its deserved place is the non-enforcement character of mediation agreement achieved outside the contentious procedure i.e. as voluntary mediation. There is a huge distrust in our society when it comes to the fact whether the obligation included in the mediation agreement will be fulfilled voluntary by the opposing party. If the unenforceability of the mediation agreement is considered so much a problem for the parties who approach mediation with insecurity, and because of this issue give up on it, why our lawmaker is not following the example of Bosnia and Herzegovina based on their Law on mediation[365], according to which, in the article 25 it is foreseen that the agreement reached between the parties in the mediation procedure immediately acquires the power of the enforcement document. But, why make such efforts when in order to make an agreement of an enforceable nature, there should not be a lot of actions and efforts of parties that are needed to be undertaken in order to gain that security and peace with the termination of mediation

[365] Zakon o postupku medijacije, Službeni glasnik BiH, br. 37/04

procedure. It is simply necessary to do some formalities such as signature of the parties and the agreement in written form to be send to the notary for certification or solemnization of the same, which action will make the agreement enforceable. Even from the material side, namely the expenses which are incurred in case of solemnization by notaries, the price is reasonable if we also take into account the small expenses of the mediation procedure compared to the expenses which can be caused in the contentious procedure and which ultimately renders an enforceable court decision. The main question, which surprises even the American experts on mediation, is why should the parties make a problem about the enforcement of the agreement, when they reached that agreement as a result of good will. Why not fulfill their obligation voluntary, when in fact both parties are considered winners in the mediation procedure? Moreover, why demand mandatory fulfillment of the obligation included in the agreement, when the purpose of mediation is to prevent it from coming to that. Then let the parties reach to contentious procedure if they consider it more reasonable to have the mandatory fulfillment of the decision by which the dispute is resolved. In my opinion, the issue of the enforceability of the mediation agreement should not present a problem, since the parties are the ones who have invested a lot in reaching that agreement. Why, for an obligation that they agreed upon together, should they demand mandatory implementation of the same? Perhaps the problem here lies in the mentality of the parties, and not in the lack of enforceability of the agreement itself, but on the other hand, it causes a serious failure of the mediation procedure.

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